No. 86-923

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

TOYOTA OF BERKELEY,
Petitioner,

v.

AUTOMOBILE SALESMEN'S UNION, LOCAL 1095,
UNITED FOOD AND COMMERCIAL WORKERS UNION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTRODUCTION

The citations to the decisions below, the basis of this Court's jurisdiction and the relevant statutory provisions are set out in pages 1 and 2 of the Petition for a Writ of Certiorari filed by petitioner and are therefore not repeated here. The statement of the case submitted by the petitioner generally states the procedural history of this case and only a few additional words are necessary.

STATEMENT OF THE CASE

In addition to the statements made in the Petition, it is important to note the following two facts: (1) the employer voluntarily submitted the question of "arbitrability" arising from the procedural question of the timeliness of the Union's demand for arbitration to the arbitrator; (2) the arbitrator, although noting the clear language of the contract, held that the employer was estopped from asserting the language in light of its conduct which lead the Union to believe that the language would not be strictly enforced. More precisely, the arbitrator noted that at the same time the grievance involved in this matter was being processed, the Union demanded on a timely basis arbitration of another grievance. (Appendix, page 22.) When the Union demanded arbitration of that grievance, as the arbitrator noted, "the Employer responded by stating that the 'request for arbitration is premature' ". (*Id.*) Thus, the arbitrator found that because of the employer's conduct, it was estopped from asserting the clear language of the contract.

REASONS FOR DENYING THE WRIT

The issue in this case concerns solely the question of whether an arbitrator should decide procedural questions arising out of a party's compliance with a grievance procedure. There are two compelling reasons why this writ should not be granted.

First, the employer voluntarily submitted to the arbitrator the question of the Union's compliance with the grievance procedure. Although this Court has not squarely addressed that question, the Ninth Circuit has held that where issues of arbitrability are voluntarily submitted to an arbitrator, the parties cannot be heard to later complain that the arbitrator should not have decided the "arbitrability" question. See *George Day Construction v. United Brotherhood of Carpenters*, 722 F.2d

1471, 1474-75 (9th Cir. 1984). This is not a case where the employer refused to arbitrate, and the court compelled the parties to resolve the questions of arbitrability. *A.T.&T. Technologies v. Communications Workers*, —— U.S. ——, 89 L.Ed. 2d 648 (1986).

There is a second compelling reason why this writ should be denied. When this Court decided *A.T.&T. Technologies v. Communication Workers* it did not disturb any settled principles of law. Indeed, since *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), procedural issues arising out of the interpretation of the agreement must be resolved by the arbitrator:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 557.

Since that decision, contrary to the suggestion of the petitioner, the courts have routinely compelled the parties to resolve such procedural issues as have arisen in this case, including the claim of the employer that the Union failed to comply with the time limits of the contract. Indeed, the position advanced by petitioner is so frivolous that the District of Columbia Circuit Court of Appeals approved the granting of fees to a Union where the employer had resisted arbitration on precisely the same ground. *Washington Hospital Center v. Service Employees Local 722*, 746 F.2d 1503, 1508-1509 (D.C. Cir. 1984). Nor is this case any different from *Shopmens Local 539 v. Mosher Steel Company*, 796 F.2d 1361 (11th Cir. 1986) in which a court confirmed an arbitration award in which an arbitrator had determined that the employer had waived its right to insist upon strict compliance with grievance procedure time limits. See also *Beer, Soft Drink Workers v. Metropolitan Distributors, Inc.*, 763 F.2d 300 (7th Cir. 1985). Thus, the Ninth Circuit properly relied upon its prior authority of *Retail*

Delivery Drivers Local 488 v. Servomation Corp., 717 F.2d 475, 477-78 (9th Cir. 1983) (Appendix, p.2.)

This case involves circumstances where the Union admittedly failed to comply with the time limits but did so because the employer had expressly refused to accept the Union's demand for arbitration of a similar grievance filed at the same time on the ground that the demand for arbitration was "premature". Based on this, the arbitrator determined that the employer was estopped from asserting the strict time limits. And this Court has held that such equitable issues as laches are to be decided by an arbitrator. *International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487 (1972). We think the arbitrator was well within his jurisdiction of holding the employer to the doctrine of estoppel. Thus, petitioner's reliance upon *Detroit Coil Co. v. I.A.M. Lodge 82*, 594 F.2d 575 (6th Cir. 1979), cert. denied, 440 U.S. 840 (1979) is misplaced. In that case the Union did not make an argument that the employer was estopped or had somehow waived compliance with the clear language of the contract.

In summary, the petitioner voluntarily submitted to arbitration the question whether the Union's efforts substantially complied with the grievance procedure and whether the employer was estopped from asserting that any failure to strictly comply with the procedure barred arbitration. The petitioner's suggestion that this case ought to be heard by this Court rests upon an assertion that *A.T.&T. Technologies* substantially undermined more than twenty (20) years of history since this court decided *John Wiley & Sons v. Livingston*. The lower courts have had no trouble in remanding questions of procedural arbitrability to arbitration and *A.T.&T. Technologies* does not disturb that judicial history.

CONCLUSION

For the reasons suggested above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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